MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

United States of America	**D-_____**
v.	**Defense Motion to Dismiss for Lack of Personal Jurisdiction** (Equal Protection Violation)
Noor Uthman Muhammed	10 March 2010

1. **Timeliness**: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.[1]

2. **Relief Sought**: The Defense requests dismissal of all charges against Noor brought pursuant to the Military Commissions Act ("MCA"). Dismissal is appropriate because the jurisdictional provision of the MCA, § 948c, violates the Equal Protection Clause of the Fourteenth Amendment, applicable to the federal government and these proceedings by virtue of the Fifth Amendment's Due Process Clause.

3. **Overview**: "Equal Justice Under Law" is a defining principle of the American legal tradition. This principle is set forth in the Equal Protection Clause of the Fourteenth Amendment, and incorporated against the states by the Due Process Clause of the Fifth Amendment. These provisions apply to all persons regardless of citizenship, whenever they appear as criminal defendants in an American court. The MCA's jurisdictional provision, §948c, violates Equal Protection in making aliens subject to lesser procedural protections than would be provided to a U.S. citizen in Article III courts. The Supreme Court has recognized discrimination based upon alienage as "inherently suspect" and subject to "close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). The MCA's targeting of aliens

[1] The Rules for Military Commission were promulgated to implement the Military Commissions Act of 2006. The Secretary of Defense has not issued new rules responsive to the 2009 amendments nor has he rescinded the existing rules, which, consequently, remain in effect at the time of this filing.

cannot survive such strict scrutiny, because it is not narrowly tailored to serve any compelling government interest. Because "the central aim of our entire judicial system" is that "all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court," the MCA's discrimination between citizens and noncitizens violates Equal Protection principles. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

4. **Burden of Proof**: The prosecution bears the burden of showing by a preponderance of the evidence that this commission properly exercises personal jurisdiction. *See* R.M.C. 905(c)(2)(B).

5. **Facts**:

   a. Noor was apprehended in [redacted] on [redacted] by [redacted] police in conjunction with United States military and law enforcement agencies. Noor has been held in continuous custody by the United States since that time.

   b. On 9 January 2009, the current charges were referred against Noor for trial by military commission and Noor was arraigned on 14 January 2009. The charges allege that Noor is "a person subject to trial by military commission as an *alien unlawful enemy combatant*."[2] (emphasis added). *See* Charge Sheet, referred 9 January 2009.

6. **Law and Argument**:

A. The Equal Protection Guarantees of the Due Process Clause of the U.S. Constitution are Applicable to Proceedings at Guantanamo.

In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court held that the constitutional right to habeas corpus applies at Guantanamo, even for the benefit of non-citizen alleged enemy combatants. In assessing whether a particular constitutional provision applies extraterritorially, the Court adopted a "functional approach" that turns on "whether judicial

[2] For the limited purpose of litigating this motion, the defense does not challenge the allegation that Noor is an alien. The burden of proof remains upon the Prosecution to establish that this commission has jurisdiction over Noor, including the burden to establish that Noor is an alien.

enforcement of the provision would be 'impracticable and anomalous.'" *Id.* at 2255, 2258 (citation omitted). This approach was deemed consistent with precedent, which demonstrate that "practical considerations, related not to the petitioners' citizenship but to their place of confinement and trial" were the key factors in the determination. *Id.* at 2256.

In applying this functional approach to the Guantanamo Bay Naval Station, the Court emphasized that the base is "under the complete and total control of our Government," and the United States is "answerable to no other sovereign for its acts on the base." *Id.* at 2261, 2262. The base is not "located in an active theater of war," "is no transient possession," and "[i]n every practical sense . . . is not abroad; it is within the constant jurisdiction of the United States." *Id.* Under these circumstances, the Court concluded that there is nothing at all "impracticable or anomalous" about applying constitutional protections at Guantanamo. *Id.* at 2262. A proper application of the "functional" test for extraterritoriality set forth in *Boumediene* demonstrates that Equal Protection guarantees of the Due Process Clause are applicable at Guantanamo.

B. Equal Protection in Criminal Procedure Is a Fundamental Right and an Element of Due Process

The Equal Protection Clause of the Fourteenth Amendment applies to all "persons" regardless of citizenship and "directs that all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

> The Fourteenth Amendment . . . is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). While the Fourteenth Amendment by its terms applies to the states, the Supreme Court has held that the Fifth Amendment's Due Process Clause (applicable to the federal government) also incorporates equal protection guarantees. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) ("The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.... [B]oth Amendments require the same type of analysis"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) ("the equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable"); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("[e]qual protection analysis in the Fifth Amendment area is the same as that under the

Fourteenth Amendment."); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638, n.2 (1975)("This court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.")

Under Equal Protection jurisprudence, laws that impinge on the exercise of fundamental rights are subject to strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[C]lassifications affecting fundamental rights are given the most exacting scrutiny."). The rights of a criminal defendant to procedural protections to ensure a fair trial have long been recognized as fundamental due process rights. Indeed, in the *Insular Cases* relied on by the Supreme Court in *Boumediene*, Fifth Amendment due process rights were explicitly called out as an example of "fundamental" rights. *Balzac v. Porto Rico,* 258 U.S. 298, 312-13 (922) ("The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico"); *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (identifying "due process of law" and "equal protection of the laws" as "natural rights enforced in the Constitution by prohibitions against interference with them"); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) ("there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law").

The Supreme Court has held that "[p]roviding equal justice" has always been a "central aim of our entire judicial system":

> Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal.... In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.

Griffin v. Illinois, 351 U.S. 12, 16-17 (1956) (internal quotation marks and citation omitted); *see also Id.* at 18 ("at all stages of the [criminal] proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discrimination"). Indeed, the Supreme Court long ago instructed that aliens are entitled to the same procedural protections as citizens in

criminal proceedings. For example, in *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), the Court upheld a deportation order for four aliens, but invalidated a sixty day sentence of imprisonment and hard labor because it was imposed without the procedural protections that citizens would have received under the Fifth and Sixth Amendments.

Strict scrutiny is also appropriate because the MCA's discrimination against aliens in the area of criminal proceedings employs a "suspect" classification. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny"). While the national government may treat aliens differently in conferring governmental benefits and in matters of immigration and naturalization,[3] there is no authority or valid rationale for discriminating in criminal proceedings based on the citizenship status of the accused. As noted by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004), citizens as well as aliens may take up arms against the United States, and may pose as great a threat to our national security. There is no national security reason to try one category of unprivileged enemy belligerents in Article III courts and the other in military commissions.

C. The MCA's Targeting of Aliens is Subject to Strict Scrutiny.

The MCA limits personal jurisdiction of military commissions to "any alien unprivileged enemy belligerent." 10 U.S.C. §948c, and therefore targets aliens, and aliens alone, for prosecution. "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). As the Supreme Court recognized in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), certain classifications, including those based on alienage, are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Id.* at 440. Such classifications

[3] *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (while aliens are not necessarily "entitled to enjoy all the advantages of citizenship," "all persons, aliens and citizens alike, are protected by the Due Process Clause" of the Fifth Amendment). This distinction between benefits and immigration issues on the one hand – where classifications based on alienage may be appropriate – and fundamental liberty interests on the other hand – where they are not – was aptly expressed in a recent case decided by the House of Lords in Great Britain, striking down a detention scheme that discriminated against noncitizens: "The Secretary of State was, of course, entitled to discriminate between British nationals on the one hand and foreign nationals on the other for all the purposes of immigration control.... What he was not entitled to do was to treat the right to liberty...of foreign nationals...as different in any respect from that enjoyed by British nationals." *A. v. Sec. of State for the Home Dept.*, [2004] UKHL 56, ¶ 105 [2005] 2 A.C. 68, 44 I.L.M. 654, ¶ 105 (2005), 2005 WL 1387995.

are therefore subject to strict scrutiny, both "[f]or [those] reasons and because such discrimination is unlikely to be soon rectified by legislative means." *Id.* As Justice Blackmun further explained, "the fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage." *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring).[4]

Legislation is also subject to particularly critical judicial review where, as here, it compromises the integrity of a criminal trial or otherwise targets a suspect class for inferior treatment before the law. *See Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.") (internal quotations omitted); *Tate v. United States*, 359 F.2d 245, 250 (D.C. Cir. 1966) (same); *see also Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of "punitive measures . . . all persons within the territory of the United States are entitled to the protection of the Constitution") (internal quotations omitted); *Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that "[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime").

D. The MCA Violates Equal Protection by Providing Lesser Protections to Aliens

[4] While the federal government has some power to classify people based on alienage classifications, those exceptions are limited to two areas of law: immigration and government benefits. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Diaz*, 426 U.S. at 81-84. Neither exception is relevant here. Indeed, courts have specifically noted that these exceptions do *not* extend to laws affecting the prosecution and punishment of crimes. *See Rodriguez-Silva v. INS*, 242 F.3d 243, 247-48 (5th Cir. 2001) (noting that although the federal government has wide discretion in setting limits on immigration and naturalization which extends to regulating aliens' exclusion and removal, it is well-settled under *Wong Wing* that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States"); *see also* Neal Katyal, *Equality in the War on Terror*, 59 Stan. L. Rev. 1365, 1367 (2007) ("While discrimination by the federal government against aliens might be justified when it is handing out government benefits, it is not appropriate when it determines whether someone can be put before a tribunal whose jurisdiction includes dispensing the most awesome powers of government, such as life imprisonment and the death penalty.").

Strict scrutiny means that the Government has the burden of demonstrating that classifications resulting in different treatments of similarly situated criminal defendants must be "precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 217. The MCA—with its different levels of protection afforded to *alien* unprivileged enemy belligerents as opposed to *citizen* unprivileged enemy belligerents—cannot survive such scrutiny.

In this case, there can be no doubt about the different and inferior treatment afforded to Noor as a defendant in front of a military commission. The different treatment is illustrated in one crucially important area, the right against self-incrimination protected by the Fifth Amendment and the UCMJ. In the *Hamdan* case the Military Judge ruled that:

> Congress did indeed intend that the MCA's protection against self incrimination should apply only at the proceeding itself, and that there should be no remedy of suppression for pre-trial statements taken without the rights warnings that are common in American law. While this result is at odds with the balance of American jurisprudence, it clearly is what Congress enacted.
>
> * * *
>
> The result in this case is at odds with what would normally obtain under our law. It is true that in any other criminal trial held in American courts, an accused who was questioned before trial, without warning regarding his right to remain silent, could not later be prejudiced by the admission of those statements against him.

Hamdan Record of Trial, AE 213, D-030 Ruling on Motion to Suppress Statements of the Accused. (Attachment A) On this basis, the Military Judge denied Hamdan's motion to suppress and admitted his pre-trial statements into evidence against him. *Id.* By contrast, a U.S. citizen facing the same charges would be tried in a civilian court, where the procedural protections would be markedly greater, *i.e.*, the "remedy of suppression for pre-trial statements taken without the rights warnings" would be applied.

If "the equal protection of the laws is a pledge of the protection of equal laws," then clearly the MCA fails to conform to that standard. *Yick Wo*, 118 U.S. at 369. Far less intrusive impositions in criminal proceedings have been subject to strict scrutiny under equal protection, and have failed to survive that analysis. For example, in *Douglas v. California*, 372 U.S. 353, 358 (1963), the Court struck down on equal protection grounds a California law that allowed the court to decline to provide appellate counsel to indigent defendants. Similarly, in *Griffin*, 351

U.S. at 15-16, the Court vacated a decision by the Illinois Supreme Court that, due to cost, effectively denied indigent defendants access to court transcripts necessary for appellate review.

Equal Protection jurisprudence reveals that in the area of criminal proceedings, American courts are determined to place all comers "on an equality before the bar of justice in every American court." *Griffin.*, 351 U.S. at 17. In this case, even if one readily acknowledges that the Government has a compelling interest in protecting the nation against terrorist attacks, the use of military commissions for alien, as opposed to citizen, enemies is not narrowly tailored to promote national security. Indeed, it makes no sense at all, except to prevent the disfavored and disenfranchised group from using the political process to protect itself. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (certain classifications, including those based on alienage, are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"). Legislation such as the MCA aimed solely at the politically powerless attracts strict scrutiny "because such discrimination is unlikely to be soon rectified by legislative means." *Id.*

E. The MCA's targeting of aliens fails strict scrutiny.

Because aliens are unable to protect themselves through the political process, any legislation that classifies individuals on the basis of alienage—and particularly any legislation that deprives only aliens of access to the courts—is "inherently suspect and subject to close judicial scrutiny." *Graham*, 403 U.S. at 372. This means that the Government bears the burden of showing both that the classification is supported by a "compelling" governmental interest and that "the means chosen . . . to effectuate its purpose [are] narrowly tailored to the achievement of that goal." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (internal quotation marks omitted). The MCA's targeting of aliens fails this test.[5]

i. Prosecuting aliens alone for no other purpose than to avoid the political accountability that would result if citizens could be tried is invidious discrimination.

The members of Congress who voted for this provision of the MCA did so with an avowedly discriminatory purpose. The legislative history reveals that the drafters' desire to

[5] Indeed, for the reasons discussed herein, the MCA would violate the Equal Protection Clause even if a *less* stringent standard of review applied, as it is not even rationally related to any legitimate government purpose.

target aliens, and aliens alone, bore no relationship to their degree of dangerousness or culpability compared to citizen terrorists. In fact, the draft of the MCA submitted by the White House applied to aliens and citizens alike. (Enemy Combatant Military Commissions Act, Ex. at § 202). It was only *after* the MCA passed through committee that it ceased to be a law of general applicability and lawmakers were candid about the reason for this change.[6] By targeting aliens alone, they could avoid "the political retribution that might be visited upon them if larger numbers were affected." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

ii. Prosecution aliens alone serves no compelling state interest.

Belying any rational (let alone compelling) government interest in prosecuting aliens alone, both historically and at present, citizens and non-citizens violate the law of war and "pose the same threat" to national security. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004). Military commissions are borne of "military necessity," *Hamdan*, 548 U.S. at 612 (plurality op.), and that necessity has nothing to do with the citizenship of the accused. The Supreme Court has twice entertained claims by U.S. citizens – including one formerly held at Guantanamo Bay – who were held for conduct that would subject a similarly situated alien to trial by military commission. *See Padilla v. Rumsfeld*, 542 U.S. 426 (2004); *Hamdi*, 542 U.S. at 519 (2004).[7]

As former Attorney General Gonzales himself warned, "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so."[8] There is no reason to believe that the governmental interest served by targeting aliens alone is any more

---

[6] *See, e.g.*, Statement of Sen. James Inhofe (2006 SASC HEARING Ex. at A96) ("I want to make sure that we have everything in place here in Congress to make sure that the attorney-client privileges are not given to the detainees, at least not to the extent that they be to American citizens."); 152 Cong. Rec. S10250 (statement of Sen. Warner) ("It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens—aliens, not U.S. citizens—bomb-makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are—again, only aliens . . . ."); *id.* at S10274 (statement of Sen. Bond) ("These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of war."); *id.* at S10251 (statement of Sen. Graham) ("Under no circumstance can an American citizen be tried in a military commission.").

[7] The House of Lords struck down similar alienage discrimination present in an English detention law. *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68, at 75-76; *see also id.* at 76-78 (Lord Nicholls) ("The Government has vouchsafed no persuasive explanation of why national security calls for a power of indefinite detention in one case but not the other.").

[8] Alberto Gonzalez, U.S. Att'y Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (16 August 2006) *available at* http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_060816.html.

compelling than what the MCA's supporters in Congress said it was. That is, the belief that aliens "do not deserve the same panoply of rights preserved for American citizens in our legal system." 152 Cong. Rec. S10395 (statement of Sen. Cornyn).

iii. Prosecuting aliens alone is not narrowly tailord.

It is no secret that citizens, as well as non-citizens, have been accused of violating the law of war and may pose a serious danger to our national security. The very fact that the MCA specifically reserves the use of military commissions for "alien" unprivileged enemy beligerents, 10 U.S.C. § 948c, only highlights the reality that some U.S. citizens would also qualify as unprivileged enemy belligerents. As the Supreme Court recognized in *Hamdi v. Rumsfeld*, "[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict." 542 U.S. 507, 519 (2004) (internal quotation omitted).[9] If the exigencies of the war on terror do not require these citizens to be tried by military commission, then they do not require non-citizens to be so tried.

The fact that federal courts have already been used to successfully prosecute both aliens and citizens for serious terrorism-related crimes demonstrates that there is no compelling governmental interest in segregating those charged with committing war crimes for separate and unequal trials based on their citizenship. Article III courts have already considered many terrorism cases involving both U.S. citizens[10] and aliens[11] associated with Al Qaeda. Many of these cases—including those involving both citizen[12] and alien[13] defendants—involved alleged

---

[9] Similarly, in striking down an English detention policy on equality grounds, the British House of Lords noted that British citizens have also been "suspected of being international terrorists" and observed that because "lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists," it is "difficult to see how the extreme circumstances, which alone would justify such detention, can exist." *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68, at 75-76; *see also id.* at 127.

[10] *See, e.g., United States v. Nettles*, 476 F.3d 508 (7th Cir. 2007) (citizen seeking Al Qaeda aid in bombing plot).

[11] *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000) (citizen prosecuted for acts committed abroad)

[12] *See, e.g., United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (citizen member of Taliban prosecuted for acts committed abroad); *see also United States v. Ali*, No.Crim.A.1:05-53, 2006 WL 1102835 (E.D .Va. 2006) (citizen member of Al Qaeda prosecuted for acts committed both in United States and abroad).

[13] *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (aliens prosecuted for conduct occurring both inside and outside of United States) ; *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (same); *United States v. Bin Laden,*

conduct committed abroad. The Supreme Court itself has twice entertained claims by U.S. citizens—including an American formerly held at Guantanamo—who have been held for conduct that would subject a similarly situated alien to trial by military commission under the MCA. *See Hamdi*, 542 U.S. 507.

There is no reason to think that a citizen who violates the MCA is any less culpable or dangerous than a non-citizen who commits the same act. Indeed, the citizen terrorist—who might well be committing treason along the way—may be far *more* dangerous than his alien counterpart. For example, Najibulla Zazi, legally residing in suburban Denver, was said by authorities to be involved in plotting the "most serious terrorist plots on American soil since Sept. 11, 2001."[14] As former Attorney General Gonzales once emphasized, "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so."[15] *Cf. A v. Sec. of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68, at 76-78 (Lord Nicholls) (striking down a British terrorist detention policy on equality grounds, and noting that "[t]he principal weakness in the Government's case lies in the different treatment accorded to nationals and non-nationals. . . . The Government has vouchsafed no persuasive explanation of why national security calls for a power of indefinite detention in one case but not the other."). If the dangers of terrorism require terrorists to be tried by military commission, then it follows that all terrorists should be tried in these commissions, not just aliens.

The United States has never before felt the need to establish special tribunals to try aliens apart from non-citizens. In *Ex Parte Quirin*, 317 U.S. 1 (1942), the German saboteurs were tried in the same military commission as Herbert Hans Haupt, their American co-conspirator. *Id.* at 18, 20. And "[e]ven the horrendous internment of Japanese Americans in World War II applied symmetrically to citizens and aliens." Neal Katyal, *Equality in the War on Terror*, 59 Stan. L. Rev. 1365, 1389 (2007).

The legislative history of the MCA confirms that the military commission system was created to target aliens and only aliens for trial by military commission regardless of their

---

et al., 93 F. Supp. 2d 484, 486 (S.D.N.Y. 2000) (alien members of Al Qaeda prosecuted for acts committed abroad) ("[S]o long as a count alleges acts committed outside the United States in furtherance of a conspiracy to kill United States nationals, it alleges a violation of [18 U.S.C.] § 2332(b).").

[14] Carrie Johnson and Spencer S. Hsu, *N.Y. terror plea hailed as validation of court strategy*, Wash. Post, February 23, 2010, at A1.

[15] Alberto Gonzalez, former U.S. Attorney Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (Aug. 16, 2006) (transcript available at http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_060816.html).

dangerousness or culpability compared to citizen terrorists.[16] In a stark illustration of the arbitrariness of the distinction, Rep. Stephen Buyer openly declared that selection of persons to be tried by commission was determined not by the gravity of the underlying conduct, not by the nature of the threat posed, and not by the adequacy of existing procedures for prosecuting terrorist suspects, but rather by alienage alone:

> Let's say an American citizen has been arrested for aiding and abetting a terrorist, maybe even participating in a conspiracy, or maybe participating in an action that harmed or killed American citizens. That American citizen cannot be tried in the military commission. His co-conspirators could be tried in a military commission if they were an alien, but if that other co-conspirator is an American citizen, they will be prosecuted under title 18 of the first chapter of a Federal crime, or even we could assimilate the State laws under the Assimilated Crimes Act.

152 Cong. Rec. H7940 (daily ed. Sept. 27, 2006) (statement of Rep. Buyer). The rationale given for treating aliens in a categorically different manner than Americans was merely the feeling of certain legislators that such treatment was what alien suspects "deserve[d]." *See* 152 Cong. Rec. S10395 (daily ed. Sept. 28, 2006) (Sen. John Cornyn) ("I happen to believe these individuals, who are high-value detainees at Guantanamo Bay, do not deserve the same panoply of rights preserved for American citizens in our legal system.").[17]

---

[16] *See, e.g.*, 152 Cong. Rec. S10,250 (daily ed. Sept. 27, 2006) (statement of Sen. Warner) ("It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens—aliens, not U.S. citizens—bomb-makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are—again, only aliens . . . ."); *id.* at S10,267 (statement of Sen. Kyl) ("This legislation has nothing to do with citizens."); *id.* at S10,274 (statement of Sen. Bond) ("These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of war."); *id.* at H7544 (statement of Rep. Buyer) ("It will not apply to United States citizens."); *id.* at S10,251 (statement of Sen. Graham) ("Under no circumstance can an American citizen be tried in a military commission."); *see also* Katyal, *supra*, at 1373 n.19 (collecting these and other citations).

[17] The arbitrariness and anti-alien sentiment behind the MCA's limitation to aliens is further demonstrated by the fact that the Executive initially considered proposing legislation that would have made all enemy combatants, aliens and citizens alike, triable by military commission. *See* Enemy Combatants Military Commission Act of 2006 (attached hereto as Attachment A); *see also* David S. Cloud & Sheryl Gay Stolberg, *Rules Debated for Trials of Detainees*, N.Y. Times, July 27, 2006, at A20; David S. Cloud & Sheryl Gay Stolberg, *White House Bill Proposes System to Try Detainees*, N.Y. Times, July 26, 2006, at A1 (describing copy of draft Administration Bill as being labeled The "for discussion purposes only, deliberative draft, close hold')'. During a Senate Armed Services Committee hearing on the draft legislation, however, Senators indicated to the Attorney General that they did not want aliens to receive the same rights as citizens. *See The Future of Military Commissions, Hearing of the Senate Armed Services Committee* (Aug. 2, 2006) (statement of Sen. Jeff Sessions) ("And let's be sure that these extraordinary protections that we provide to American soldiers and American civilians, because we live in such a safe nation that we can take these chances and give these extra rights, that we don't give them to people who have no respect for our law and are committed to killing innocent men and women and children."); *id.* (statement of Sen. James Inhofe) ("I want to make sure that we have everything in place here in Congress to make sure that the attorney-client privileges are not given to the detainees, at least not to the extent that they be to American citizens.").

Satisfying some vague sense that aliens do not "deserve" the protections provided by our domestic criminal justice system is not a compelling (or even legitimate) state interest. To the contrary: crafting legislation specifically to disadvantage a discrete and insular minority whose members have no influence in the political process is not only an illegitimate interest, but is the very harm the Equal Protection Clause is intended to prevent. As Justice Scalia has noted, "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *see also, e.g., Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). In such situations, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Id.* at 300. The MCA effectively—indeed, *purposefully*—violates that basic principle.

If Congress determines that alleged violations of the MCA create unique dangers that demand trial by military commission instead of in federal courts, then the Equal Protection Clause requires that it make all defendants—whether alien or not—eligible for trial by military commission. The Equal Protection Clause thus does not require that military commissions be eliminated, only that they be evenly applied. Katyal, *supra*, at 1368 ("The logic of equal protection challenges, by contrast, does not require the political branches to attain any particular substantive standard of protection; it merely requires that the chosen standard be doled out evenhandedly to all persons."). As Justice Scalia has explained:

> Invocation of the equal protection clause [compared to the due process clause] does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Cruzan, 497 U.S. at 300 (1990) (Scalia, J., concurring). Under the Equal Protection Clause of the U.S. Constitution, trial by military commissions must be imposed equally or not at all.

F. The MCA Violates Equal Protection Guarantees Under International Law

The fundamental commitment to equal protection under the law exists not only under the U.S. Constitution, but also at international law. The International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, sets out in article 14(1) that all persons "shall be equal before the courts and tribunals."[18] The laws of war guarantee this right during an armed conflict. For example, the provisions of the Geneva Conventions dealing with grave breaches provide: "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949."[19]

The International Committee of the Red Cross Commentary on the Geneva Conventions explains that those articles common to the Conventions require that

> court proceedings . . . be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.[20]

---

[18] Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by U.S. on June 8, 1992) [hereinafter ICCPR]; *see also* Exec. Order No. 13107 (Implementation of Human Rights Treaties) ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR . . . .").

[19] Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, art. 49, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea, art. 50, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, art. 146, *opened for signature* Aug. 12, 75 U.N.T.S. 287. All four conventions were ratified by the United States on Aug. 2, 1955.

[20] *See* International Committee of the Red Cross, Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Commentary (1960).

The MCA, by setting up special tribunals to try only *aliens* who are alleged to have violated the law of war, violates this fundamental principle of international law.

CONCLUSION

The right to equal protection under law is a fundamental part of both U.S. and international law. The MCA violates this principle by classifying persons accused of alleged war crimes based on their citizenship, and subjecting aliens—and only aliens—to trial by military commissions. The Government has offered no legitimate, let alone compelling, explanation for why it is necessary to subject aliens to trial by these special tribunals, but not U.S. citizens charged with similar (or even more dangerous) crimes. The Equal Protection Clause does not require Congress to establish any minimum substantive or procedural rights for the trials of those charged with war crimes. It requires only that the rights and rules Congress establishes be applied equally to all similarly charged defendants, regardless of their citizenship. The MCA was explicitly designed to contravene this principle, and thus violates the principles of Equal Protection.

7. **Request for Oral Argument**: The Defense requests oral argument.

8. **Request for Witnesses and Evidence:** None.

9. Conference with Opposing Counsel: The Defense conferred with the Prosecution regarding the requested relief. The Prosecution objects.

10. Additional Information: None.

11. Attachments:

A. *Hamdan* Record of Trial, AE 213, D-030 Ruling on Motion to Suppress Statements of the Accused

B. Enemy Combatant Military Commission Act of 2006

Respectfully submitted,

BY: _____

Katharine Doxakis
LCDR, JAGC, USN

Christopher Kannady
Capt, USMC
Office of Military Commissions
1600 Defense Pentagon
Washington DC 20301

Detailed Defense Counsel for
Noor Uthman Muhammed

_____

Amy S. Fitzgibbons

Howard Ross Cabot
Perkins Coie Brown & Bain
2901 North Central Ave, Suite 2000
Phoenix, AZ 80512

Civilian Pro Bono Counsel for
Noor Uthman Muhammed

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA	**D-017**
v.	**Government Response to Defense Motion to Dismiss for Lack of Personal Jurisdiction (Equal Protection Violation)**
NOOR UTHMAN MUHAMMED	**17 March 2010**

1. **Timeliness.** This response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.6.b and the Commission's scheduling order. The Defense motion was received on 10 March 2010.

2. **Relief Requested.** The Defense motion should be denied.

3. **Overview.** The Military Commissions Act of 2009, 10 U.S.C. § 948a *et seq.* ("MCA"), is not invalid under the equal protection provisions of either the United States Constitution or international law. First, the equal protection component of the Fifth Amendment Due Process Clause does not extend to alien enemy belligerents, such as the Accused, who are captured and held overseas and have no substantial voluntary connection to the United States. Second, even if constitutional equal protection did apply, Congress' historically grounded decision to establish military commissions to prosecute alien enemy belligerents for war crimes does not run afoul of constitutional equal protection, as it does not pose the sort of invidious classification that triggers strict scrutiny; on the contrary, drawing distinctions between citizens and alien enemies when the United States is at war with foreign foes is entirely appropriate and rationally related to the legitimate governmental interest of safeguarding the national security of the United States. Finally, the MCA is fully consistent with international law, which in any event cannot override

an unambiguous Congressional enactment that complies with the Constitution.

4. Burden and Standard of Proof. The Government bears the burden of persuasion on a motion to dismiss for lack of jurisdiction. *See* R.M.C. 905(c)(2)(B).

5. Facts

a. The Government agrees that the Accused has been in detention since his capture in [redacted] in [redacted] and is currently being held at the U.S. Naval Station in Guantanamo Bay, Cuba.

b. The Government agrees that the Accused is currently charged with war crimes as an "alien unlawful enemy combatant." Under the amended MCA of 2009, that jurisdictional term is now described as an "alien unprivileged enemy belligerent." For purposes of this motion response, these terms are used interchangeably.[1]

c. The Government also submits the following additional facts:

1. The Accused's capture occurred in the wake of the United States' military invasion of Afghanistan (Pakistan's western neighbor) in pursuit of terrorists and terrorist organizations responsible for the attacks against the United States homeland on 11 September 2001.

2. In addition to the Accused's non-U.S. citizenship, the Accused has never been a resident of the United States or established any substantial voluntary connection with this country.

[1] While the jurisdictional language under the amended Military Commissions Act (M.C.A.) of 2009 ("alien unprivileged enemy belligerent") is slightly different than the jurisdictional language by which the Accused was originally charged under the M.C.A. of 2006 ("alien unlawful enemy combatant"), the underlying substance of the Commission's jurisdiction over the Accused has not changed. In light of the amended jurisdictional language under the M.C.A. of 2009, the Government intends to request minor changes in the charge sheet at the next commission proceeding. *See* M.C.A. of 2009, Pub. L. No. 111-84, § 1804(c)(2), 123 Stat. 2612 (2009) ("[A]ny charges or specifications [sworn or referred under the M.C.A. of 2006] may be amended, without prejudice, as needed to properly allege jurisdiction under [the M.C.A. of 2009] and crimes triable under such chapter.").

6. Law and Argument

The MCA does not violate any applicable equal protection provisions under either the United States Constitution or international law. Constitutional due process, including equal protection, does not extend to captured alien enemy belligerents in the circumstances of the Accused. Even if it did, drawing wartime distinctions between citizens and alien enemies does not pose the sort of invidious classification that equal protection aims to rectify, as it is rationally related to detaining and prosecuting captured enemy belligerents for war crimes as a means of safeguarding the national security of the United States. Finally, the MCA is valid under international law, which in any event cannot override an unambiguous enactment by Congress.

a. Alien Enemy Belligerents, Such as the Accused, Who Have No Connection to the United States Other Than Their Capture and Detention, Have No Claim to Equal Protection under the Fifth Amendment Due Process Clause.

The Supreme Court has squarely held that alien enemy combatants held outside the United States who have no connection to the United States other than their confinement possess no rights under the Fifth Amendment Due Process Clause.[2] In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—who were captured in China by U.S. forces during World War II, tried by military commission overseas, and imprisoned at a U.S. military base in Germany—sought habeas relief in U.S. federal court. Although the military base in Germany was controlled by the U.S. Army, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no rights under the Fifth Amendment. *See id.* at 766, 782-85. The Court noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in "a more protected position than our own

[2] Although the Fifth Amendment does not have an equal protection clause, the Supreme Court has held that its Due Process Clause contains an equal protection component. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution").

soldiers," who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. Rejecting this argument, the Court held that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted). The Court thus found "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses." *Id.* at 783.

The ruling in *Eisentrager* is consistent with the Supreme Court's earlier holding in *Ex Parte Quirin*, 317 U.S. 1 (1942), with respect to the applicability of the Fifth Amendment to enemy belligerents charged before military commissions. *Quirin* involved a group of German saboteurs who infiltrated the United States during World War II, where they conspired to mount clandestine attacks against U.S. targets, and, upon capture, were charged with war crimes before a military commission convened in Washington, D.C. In dealing with the petitioners' Fifth Amendment claims, the Court found that violations of the law of war (such as those charged in this case) do not constitute "crimes" or "criminal prosecutions" within the meaning of the Fifth Amendment:

> In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

Quirin, 317 U.S. at 40.

Subsequent Supreme Court precedent has reaffirmed *Eisentrager*'s conclusion that aliens captured and held outside the United States have no claim to Fifth Amendment due process rights, including equal protection. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court confronted an argument very similar to what the Defense is asserting in this case—that, with respect to Fourth Amendment protections, "to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment." *Id.* at 273. Rejecting this contention, the Court held that a nonresident alien seeking such constitutional protections must establish not only that he has come within United States sovereign territory, but also that he has developed substantial voluntary connections with this country. *See id.* at 271-72. The Court further held that involuntarily transport to and detention within the United States is not the sort of substantial voluntary connection to the United States that would give rise to Fourth Amendment protections with respect to the search of property abroad by U.S. agents. *See id.* at 271; *accord Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders.") (citing *Verdugo-Urquidez* and *Eisentrager*).

Notwithstanding the Defense's position, the Supreme Court's more recent decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), does not impact the viability of these earlier precedents. In concluding that uncharged enemy combatants at Guantanamo Bay must at some point be afforded the right to challenge their detention through federal habeas actions, the Court in *Boumediene* centered its holding on historical reaches unique to the writ of habeas corpus, *see id.* at 2244-51, and the adequacy of the detention review (Combatant Status Review Tribunal (CSRT)) process that the petitioners had received, *see id.* at 2262-74; however, the Court

signaled no intention of extending the full panoply of constitutional protections to alien enemy combatants detained at Guantanamo Bay who, like the Accused, face trial by military commission. To the contrary, citing *Eisentrager* approvingly, the Court in *Boumediene* explicitly contrasted the Guantanamo habeas petitioners with the litigants in *Eisentrager*:

> The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, *there has been no trial by military commission for violations of the laws of war*. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, *there had been a rigorous adversarial process to test the legality of their detention*. The *Eisentrager* petitioners were *charged by a bill of particulars that made detailed factual allegations against them*. To rebut the accusations, they were *entitled to representation of counsel*, *allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.*

Boumediene, S. Ct. at 2259-60 (citations omitted) (emphasis added).

Given the similarities between the Accused in this case and the petitioners in *Eisentrager*, even if the Accused could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Court's decision in *Boumediene* did not, in any terms, upset the well-established holding that other constitutional rights, including those of the equal protection component of the Due Process Clause, do not apply to captured alien enemy belligerents who, like the Accused, lack any substantial voluntary connection to the United States. As the Court explained in *Agostini v. Felton*, 521 U.S. 203 (1997),

> [I]f a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id. at 237-38 (quotation omitted). Thus, the recognition that *Boumediene* did not overrule the *Eisentrager* and *Verdugo-Urquidez* line of decisions is sufficient in and of itself to deny the Defense motion.

b. Even if the Equal Protection Component of the Due Process Clause Did Extend to the Accused, Congress' Decision to Apply the MCA Only to *Alien* Enemy Belligerents Does Not Violate Equal Protection.

Even if Fifth Amendment Due Process were found to apply to the Accused, the MCA does not violate its equal protection component. Since its inception, the United States has drawn distinctions between citizens and enemy aliens, particularly during periods of armed conflict. Hence, the MCA's applicability only to alien enemy belligerents does not pose the sort of invidious discrimination that invokes strict scrutiny under equal protection jurisprudence. Rather, it is an entirely appropriate, historically grounded distinction that is rationally related to safeguarding the national security of the United States.

(1) Since Congress' Historically Rooted Classification of Alien Enemy Combatants Under the MCA Is Within Its Broad Federal Powers, It Is Subject to Great Deference and Does Not Invoke Strict Scrutiny.

The MCA's enactment is by no means the first time the United States government has drawn the distinction between citizens who assist our enemies and aliens who are not members of our political community, who owe no allegiance to the United States. The Continental Congress, for example, subjected spying by "all persons not citizens of, or owing allegiance to, the United States of America" to trial by military tribunals. Act of Aug. 21, 1776, 5 Journals of the Continental Congress 693 (1906). Congress continued this distinction between citizens (and persons owing allegiance to the United States) and others, when adopting the new Articles of War. *See* Act of Apr. 10, 1806, 2 Stat. 371 (1806). Indeed, the Constitution itself distinguishes citizens from aliens by mandating heightened proof requirements for the crime of treason, which

by definition may only be committed against one's own government (to whom one owes allegiance), *see Black's Law Dictionary* 1501 (6th ed. 1990):

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

U.S. Const. art. III, § 3, cl. 1.[3] This well-founded historical practice should therefore be given considerable weight when assessing Congress' power to render once again this very basic sovereign distinction between citizens and alien enemies in a time of war. *See, e.g.*, *Hampton v. United States*, 276 U.S. 394, 412 (1928) ("[C]ontemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given to its provisions.") (citing *Myers v. United States*, 272 U.S. 52, 175 (1926)).

Moreover, the Supreme Court has made clear that, in both war and peace, *federal* (as opposed to state) policies regarding aliens are subject to great deference, since they stem from the federal government's broad power over foreign affairs, immigration, and naturalization. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the states.") As the Court has repeatedly observed,

---

[3] In his dissent in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice Scalia described at length the distinctions historically drawn between citizen and enemy aliens during wartime:

> In both the current and in past armed conflicts, the United States has distinguished between citizen and enemy combatants, including the use of federal courts or military commission trials. Two American Citizens alleged to have participated during World War I in a spying conspiracy on behalf of Germany were tried in Federal Court. A German member of the same conspiracy was subjected to military process. During World War II, the famous German saboteurs of *Ex Parte Quirin* received military process, but the citizens who associated with them (with the exception of one citizen-saboteur) were punished under the criminal process.

Hamdi, 542 U.S. at 560 (Scalia, J., dissenting) (citations omitted).

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Mathews v. Diaz, 426 U.S. 67, 81 (1976) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977). The MCA should be afforded the same measure of deference before this Commission.

In light of its deep historical underpinnings as an aspect of core federal governmental power, distinguishing between citizens and alien enemies during periods of armed conflict is thus categorically different from the cases cited by the Defense that involved other sorts of "invidious discriminations" requiring strict scrutiny. *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956). First, contrary to the Defense's assertions, it should be noted that "[t]he fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is „invidious.'" *Matthew v. Diaz*, 426 U.S. 67, 80 (1976). Second, as discussed *supra*, the Supreme Court has clearly, and repeatedly, held that alienage *is* an appropriate and relevant factor for determining whether constitutional rights should be extended extraterritorially. As the Supreme Court noted in *Eisentrager*,

> Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection. . . .

339 U.S. at 769.

The Defense is therefore mistaken in its reliance on cases such as *Graham v. Richardson*, 403 U.S. 365 (1971), for the proposition that the MCA's application only to alien enemy belligerents presents the sort of discrimination that invokes strict scrutiny. *Graham* stands for the unremarkable proposition that discrimination in administering *state* welfare programs based

on the classification of *resident* aliens, *voluntarily* in the United States, will be strictly scrutinized. Nothing in *Graham*, or any other case cited by the Defense, suggests that the Supreme Court meant to require heightened scrutiny for claims against the *federal* government by *nonresident* alien enemy belligerents captured abroad and held outside the sovereign borders of the United States. As the Court itself has specifically stated, "We did not decide in *Graham* nor do we here whether special circumstances, such as *armed hostilities* between the United States and the Country of which an alien is a citizen, would justify the use of classification based on alienage." *In Re Griffiths*, 413 U.S. 717, 722 n.11 (1973) (emphasis added); *see also Verdugo-Urquidez*, 494 U.S. at 273 (rejecting nonresident alien's reliance on *Graham*).[4]

While lower courts have applied strict scrutiny to *state* classifications of aliens, the same courts have held, with equal fervor, that *federal* classifications based on alienage are subject only to the more deferential rational basis review.[5] Arguments similar to the Defense's, for example, have been advanced by alien defendants accused and convicted under the Hostage Taking Act, 18 U.S.C. § 1203, which Congress passed to implement the International Convention Against the Taking of Hostages based on the belief that kidnapping involving foreign nations has serious

[4] Similarly inapposite is the language the Defense quotes from *Toll v. Moreno*, 458 U.S. 1 (1982), in this regard. *Toll* considered only whether an in-state tuition policy violated the Supremacy Clause, and did not consider whether aliens were a suspect class. *See* 458 U.S. at 9-10 ("[W]e hold that the University of Maryland's in-state policy, as applied to G-4 aliens and their dependents, violates the Supremacy Clause of the Constitution, and on that ground affirm the judgment of the Court of Appeals. *We therefore have no occasion to consider whether the policy violates the Due Process or Equal Protection Clauses.*") (emphasis added) (footnote omitted). The only member of the majority in *Toll* who took a position on the Equal Protection Clause of the Fourteenth Amendment was Justice Blackmun, *see id.* at 19-24 (Blackmun, J., concurring), whose view drew sharp criticism from the dissent on the very point at issue here. *See id.* at 39 (Rehnquist, J., dissenting, joined by Burger, C.J.) ("[I]t is clear that not every alienage classification is subject to strict scrutiny.").

[5] Although the MCA's jurisdiction extends to both resident and nonresident aliens, the Accused, as a nonresident alien, has no standing to allege an equal protection violation on behalf of resident aliens. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987). Even if the Accused's equal protection challenge were considered on behalf of the broader class of resident aliens, however, it would still be subject only to the lower standard of rational basis review. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

international consequences. As enacted, the Hostage Taking Act—like the MCA—only applied to aliens, who have challenged the law on equal protection grounds, arguing that it discriminates on the basis of alienage and should therefore be subject to strict scrutiny. Courts have repeatedly rejected this view, holding that judicial deference to Congress in such matters of foreign policy dictates that only the lower standard of rational basis review is required. *See, e.g., United States v. Lopez-Flores*, 63 F.3d 1468, 1473-74 (9th Cir. 1995) ("The same principles that animate both the Constitution's grant of plenary control over immigration legislation to Congress and the attendant low level of judicial review of such legislation dictate a similarly low level of review here, where foreign policy interests are strongly implicated."); *United States v. Ferreira*, 275 F.3d 1020, 1025 (11th Cir. 2001) (rejecting appellants' attempt to distinguish a criminal conviction under the Hostage Taking Act, noting that Congress enjoys broad classification authority over aliens); *United States v. Montenegro*, 231 F.3d 389, 395 (7th Cir. 2000) (finding classification based on alienage in the Hostage Taking Act subject to rational basis review); *Rodriguez v. United States*, 169 F.3d 1342, 1347 (11th Cir. 1999) (same); *United States v. Santos Rivera*, 183 F.3d 367, 373 (5th Cir. 1999) (same); *United States v. Lue*, 134 F.3d 79, 87 (2nd Cir. 1998) ("As long as the Hostage Taking Act is rationally related to a legitimate governmental interest it satisfies principles of equal protection in this context.").

The basis for this deference—that the regulation of aliens is committed to the federal political branches—is all the more appropriate in the present case, which involves the regulation of aliens held and prosecuted as enemy belligerents, thus implicating grave war powers, national security, and foreign policy concerns. *See Diaz*, 426 U.S. at 81 ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."). The strong

foreign policy implication associated with the war on terror, coupled with the Supreme Court's recognition of Congress' power to enact legislation pertaining to its war powers, therefore dictates that the MCA's alienage distinction be reviewed under the deferential rational-basis standard.

(2) Congress' Classification of Alien Enemy Belligerents Under the MCA Is Rationally Related to the Legitimate Governmental Purpose of Safeguarding the National Security of the United States.

Under the rational-basis standard, the jurisdictional provision of the MCA must be upheld as long as a court can identify a rational basis for it in the service of a legitimate governmental objective. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000) ("As we have explained, when conducting rational basis review „we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.'") (alterations in original) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). Determining whether legislation has a rational basis requires a two-step process: first, identifying a legitimate governmental purpose for the legislation and second, ascertaining whether there is a rational basis to believe that the legislation furthers that legitimate governmental purpose. *See, e.g., United States v. Ferreira*, 275 F.3d 1020, 1026 (11th Cir. 2001) (citation omitted). Finally, notwithstanding the Defense's contentions about what factors might have influenced the drafting of the MCA, rational-basis review plainly dictates that a legislative enactment survives if the reviewing court can conceive of a legitimate governmental purpose, irrespective of what the actual motivations of the legislature might have been. *See Ferreira*, 275 F.3d at 1026.

Conceiving of a legitimate legislative purpose is not difficult for the MCA, which was enacted in the wake of the most serious aggression ever committed against the United States on its soil by alien belligerents trained by and affiliated with foreign-based terrorist organizations. Congress, in exercise of its constitutional powers to provide for the common defense, declare war, define and punish offenses against the law of nations, and provide the Commander-in-Chief with the necessary and proper tools to wage war, enacted the MCA as a means of assisting in the protection of the national security of the United States. As even the Defense concedes, if there were ever a legitimate governmental purpose for legislation, Congress has one in this case.

Moreover, tailoring the MCA to apply only to alien enemy belligerents is rationally related to that national security purpose. Distinctions between citizens and aliens drawn by Congress and the President are wholly appropriate when the United States is at war with foreign foes. In a time of war, the federal government must use force to prevent the enemy, whether a foreign state or a foreign terrorist organization, from harming American lives and property. To do so, it is not only eminently reasonable but also absolutely necessary that the government draw distinctions between citizens and alien enemies in determining when to use force, as well as how to detain belligerents and punish violations of the law of war. Were the Global War on Terror not primarily foreign in nature, the threat it poses to public safety would be either a criminal problem or an insurrection. Because the threat the United States faces is ultimately a foreign one, distinctions between citizens and aliens that might be inappropriate with respect to ordinary domestic criminal matters are rational and appropriate in the context of detaining enemy belligerents and deterring war crimes.[6]

[6] For this reason, the Defense's reliance on *Wong Wing v. United States*, 163 U.S. 228 (1896), and *Rodriguez-Silva v. INS*, 242 F.3d 243 (5th Cir. 2001), is misplaced. While it might generally be true for ordinary criminal matters in domestic court that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States," *Rodriguez-Silva v. INS*, 242 F.3d at 247 (citing *Wong Wing*), as discussed

In balancing the national security interests of the United States against the interests of these alien enemy belligerents, Congress deemed it appropriate to use military commissions—which have traditionally been used to try alien enemies—to bring those combatants to justice in appropriate cases. As the Supreme Court explained in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), such commissions have historically been "convened as an 'incident to the conduct of war' when there is a need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'" *Id.* at 2776 (plurality op.) (quoting *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)). Here, Congress and the President have jointly enacted a system of military commissions to try violations of the law of war and related offenses. *Cf. id.* at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("[Prior to the MCA's enactment] Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.").

To the extent the Defense claims the use of military commissions impermissibly burdens the Accused's access to civilian courts, such a conclusion would squarely contradict not only the plurality's holding in *Hamdan*, but also Supreme Court precedents supporting Congress' ability to handle enemy aliens as it deems appropriate. In *Ludecke v. Watkins*, 335 U.S. 160 (1948), for example, the Supreme Court determined that no constitutional issue existed with respect to the severe restrictions on judicial access and review for a person determined to be an enemy alien with respect to the summary seizure and removal of the alien under the Alien Enemy Act of 1798, 50 U.S.C. § 21. *See Ludecke*, 335 U.S. at 163-64, 170-73; *see also Eisentrager*, 339 U.S.

---

supra, the analysis is not the same for alien enemy belligerents detained during a period of armed conflict who lack any substantial voluntary connection to the United States and are charged with war crimes before military commissions.

at 775 (citing *Ludecke*). Indeed, none of the cases cited by the Accused regarding restrictions on access to courts involves policies related to the access of aliens held as enemy combatants or rationales that would legitimately apply to issues of such access. Nor does the Defense's mere invocation of equal protection principles somehow constitutionalize, or turn into a fundamental right, any aspect of court access or judicial review that the Defense claims the Accused lacks as a result of the MCA. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) ("It is not the province of [the courts] to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").

Finally, just as nothing in the Constitution requires that aliens and citizens be accorded the same treatment with respect to illegal acts of war against the United States, *see, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 (1952) ("Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . .") (footnotes omitted), nor does anything in the Constitution forbid Congress from approaching the trial of enemy combatants in a piecemeal fashion—by legislating only with respect to *alien* unlawful enemy belligerents in the MCA. As the Supreme Court noted in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955),

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Id. at 489 (citation omitted). Furthermore, Congress does not violate equal protection simply because it fails to address every possible concern. *See id.* (finding that the Equal Protection Clause does not forbid a state from restricting one elected officeholder's candidacy for another elected office unless and until it places similar restrictions on other officeholders); *see also*

McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969) ("[A] regulation is not devoid of a rational predicate simply because it happens to be incomplete. . . . [A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."). Rather, so long as Congress' decision that the MCA apply to enemy aliens is rationally related to the legitimate governmental purpose of safeguarding the national security—as the foregoing discussion has demonstrated—the statute survives constitutional scrutiny and should be upheld.

c. The MCA Does Not Violate Any Equal Protection Component of International Law, Which in Any Event Cannot Invalidate a Later Unambiguous Act of Congress.

Just as it is valid under the U.S. Constitution, the MCA is not invalidated by any applicable equal protection provisions under international law. First, the Defense cites no legal precedent for the proposition that international law forbids the United States from the centuries old practice of drawing rational distinctions between citizens and alien enemies in deciding how best to protect itself against foreign enemies, whether by engaging them in combat, detaining them, or, if appropriate, prosecuting them for war crimes. If anything, the Geneva Conventions themselves contemplate a detaining power's potential use of different forums to prosecute war crimes, depending on the status of the charged offender. *Compare* Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), art. 105, Aug. 12, 1949, 75 U.N.T.S. 135 (discussing the procedural safeguards for war crimes prosecutions against prisoners of war) *with* Geneva Convention Relative to the Protection of Civilian Persons in Times of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 (discussing war crimes prosecutions against civilians that have at least the same procedural safeguards as those outlined in GPW, art. 105).

Second, the MCA readily complies with any applicable equal protection provisions and procedural safeguards under international law. The military commissions that Congress has constituted under the MCA are robust and fair, permitting the assistance of defense counsel, *see* R.M.C. 502(d)(6), 506; a right to discovery, including a right to exculpatory evidence or an adequate substitute if such evidence is classified, *see* R.M.C. 701; the right to take depositions, *see* R.M.C. 702; the right to call witnesses, *see* R.M.C. 703; and many other rights that are carefully described in both the MCA and the Rules for Military Commissions, including the presumption of innocence until guilt is proven beyond a reasonable doubt. *See* 10 U.S.C. § 949l(c)(1). In addition, the accused will have his case heard before an impartial judge, *see* R.M.C. 902, and will have the right to test and challenge the impartiality of the commission panel members who will decide his guilt or innocence. *See* R.M.C. 902. If the Accused is convicted, he has the right to have his case reviewed by the U.S. Court of Military Commission Review, *see* R.M.C. 1201, and may petition for further review by the U.S. Court of Appeals for the D.C. Circuit, and even by the U.S. Supreme Court. *See* R.M.C. 1205. These protections far exceed the baseline due process protections outlined under international law for such proceedings. *See* GPW, art. 105.

Moreover, even if international law called for some system of military commissions different from that authorized by the MCA, the Accused has not cited a single case for the proposition that Congress is bound by international law in enacting the MCA. As the Supremacy Clause makes clear, it is the *Constitution*, not international law, that is the supreme law of the land. *See* U.S. Const. art. VI, cl. 2. Congress always retains the authority to abrogate or repeal a treaty by a later-enacted statute. *See, e.g.*, *Edye v. Roberston (Head Money Cases)*, 112 U.S. 580, 599 (1884); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly

taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."). Nor does any provision of customary international law bind Congress, so long as Congress acts in accordance with the Constitution. *See, e.g.*, *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that international law is relevant to U.S. courts "where there is no treaty and no controlling executive or legislative act or judicial decision"). Nor does the canon of construction articulated by *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), stand to the contrary. There, the Supreme Court held that an ambiguous statute should be construed, to the extent possible, so as not to conflict with international law. *See id.* at 118. As the U.S. Court of Appeals for the Second Circuit has explained, however, "[t]his canon of statutory interpretation . . . does not apply where the statute at issue admits no relevant ambiguity." *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). Since the MCA unambiguously extends jurisdiction only to *alien* unprivileged enemy belligerents, the *Charming Betsy* canon of construction has no applicability.

d. Conclusion

As the foregoing discussion demonstrates, alien unprivileged enemy belligerents held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the equal protection component of the Fifth Amendment Due Process Clause. Even if they did, the MCA's application only to *alien* unprivileged enemy belligerents is a rational distinction for Congress to make when the United States is at war with foreign enemies. Such a distinction is fully consistent with international law, which in any event cannot override an unambiguous congressional enactment like the MCA. For these reasons, the Defense motion to dismiss should be denied.

7. Oral Argument. The Government does not request oral argument, but is prepared to argue should the Commission find it helpful.

8. Witnesses and Evidence. None

9. Additional Information. None

10. Attachments. None

Respectfully submitted,

By: ___//s//_____
Maj James Weirick, USMC
LCDR Arthur L. Gaston III, JAGC, USN
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, DC 20301